COURT OF SESSION.

Tuesday, January 24.

SECOND DIVISION.

[Sheriff-Substitute of Aberdeen, Kincardine, and Banff.

FORBES *v.* ABERDEEN HARBOUR COMMISSIONERS.

Reparation—Personal Injury—Contributory Negligence—Boy aged Sixteen.

In reclaiming the old bed of a river certain harbour commissioners left a piece of water 6 feet deep unfenced and without a watchman. A boy of sixteen, who had been for three weeks employed at work on the reclaimed ground, made a raft out of some railway sleepers which were floating on the water, and having pushed off from the bank was capsized and drowned.

In an action of damages by his father against the harbour commissioners, the Court *assoilzied* the defenders, holding that there was no obligation on them to provide against a voluntary act such as that which caused the death of the deceased.

By the Aberdeen Harbour Act of 1868 the Aberdeen Harbour Commissioners obtained power to divert the river Dee, and to reclaim and fill up the then existing bed, and the tidal lands adjoining thereto. They commenced operations in 1872, and filled up a large portion of the old bed of the river which was commonly known as the "reclaimed ground," and was in close proximity to Market Street, a leading thoroughfare in Aberdeen. There was, however, a portion of the old bed of the river which remained, filled with water, covering an area of about half-an-acre. This piece of water was about 6 feet deep at a short distance from the edge, and was unfenced. On 25th June 1885 a youth of sixteen years old named Alexander Forbes, who had been working for three weeks as an apprentice joiner at a building which was in course of erection on the reclaimed ground, and who had been left to watch his fellow-workmen's tools during the breakfast hour, went down to the water and made a raft out of some railway sleepers and planks of wood which were floating on the water, and pushed off from the bank. He overbalanced himself, and fell into the water and was drowned. His father raised this action of damages for £500, on the following grounds, which were stated in his pleas-in-law—"(2) The defenders having failed to protect and fence the said hole, which was very dangerous, and to which they gave unrestricted access, they are liable in any consequences that may arise therefrom. (3) The pursuer's said son having been killed through the culpable fault, gross negligence, and inattention of the defenders or others for whom they are responsible, in allowing the said hole to remain unfenced and unprotected, the defenders are liable to the pursuer in damages and solatium as sued for."

The defender pleaded—"(4) The deceased's own recklessness and negligence being the direct cause of his death, or having materially contributed thereto, the defenders are not liable in reparation or otherwise."

Proof was led, in which the above facts were established, and its import otherwise appears in the notes of the Sheriffs.

There had been a previous action against the defenders arising out of similar circumstances, in which the boy who was drowned was seven years old. Damages were awarded against the defenders by both Sheriffs, and the case was not appealed to the Court of Session.

The Sheriff-Substitute (Brown) on 16th September 1887 pronounced this interlocutor . . . . —"Finds in law that the deceased was drowned through the fault of the defenders or those for whom they are responsible, and that they are liable to the pursuer in damages therefor; assesses the said damages at £100.

"*Note.*— . . . The real point of interest in the case, and the only one as it seems to me which presents any difficulty, is the question of contributory negligence. Of course, if there is any force in the view that the defenders as public trustees had a duty on them to contrive effectual measures for the public safety, the question of contributory negligence is at an end. But the pursuer's case must be dealt with on an assumption short of this, and as involving the doctrines which the Court has applied in defining the doctrine of contributory negligence. That the defenders were guilty of primary negligence does not seem to me to admit of any reasonable doubt. The question therefore comes to be the character of the act of the deceased, and how far it serves to protect the defenders from the consequences of their own fault. In dealing with this class of cases it seems to me that the courts of both countries have shown a tendency to keep contributory negligence in the background in proportion as the primary negligence approaches the standard of *culpa lata*. In the English case of *Radley*, December 1, 1876, 1 L. R. (Ap. Ca.) 754, the House of Lords went a long way in that direction, holding that the plaintiff's negligence, although it contributed to the accident, would not avail to relieve the defendant from liability if the latter could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened. In *Sharp* v. *The Pathhead Spinning Company*, January 30, 1885, 12 R. 574, there could be no doubt of the negligence of the injured party, in so far as she violated a prescribed condition of her service, but the Court refused to be influenced by that, because the girl, not quite fourteen, had been wrongly employed at a dangerous occupation. In the principles common to them, this case seems to me to have a close application to the present one, for there can be no doubt of the danger of the place where the deceased met his death, and I am not disposed to distinguish between ages so closely approximating as 14 and 16. In the still more recent case of *Findlay* v. *Angus*, 14 R., which was first tried in this Court, the Judges of the Second Division even more emphatically affirmed the doctrine that where the primary negligence is gross, and but for that the result might have been averted, the alleged contributory negligence will be disregarded.

Now, here it seems to me that while the act of the defenders in tolerating what was really a man-trap in a public thoroughfare was highly culpable, the negligence of the deceased in yielding to the temptation of amusing himself on the floating sleepers was of a most excusable character, and was something very far short of the type of contributory negligence which Lord Young (in *M'Nally* v. *King and Others*, October 27, 1886, 24 S. L. R. 13) described as common in the cases coming before the Court. It is in evidence that boys of sixteen and seventeen were in use to amuse themselves on this sheet of water as the deceased did, and there is nothing to suggest that they had any reason to suspect the danger, least of all that it was acted upon by the tide, and thus might in a sense be connected with the harbour or river. I quite see the difficulty of drawing the line. Is such an act, in itself undoubtedly reckless, if committed by a man of mature years, to have no effect in staying the consequences of the defenders' fault? I should hesitate to negative that proposition, and yet the case of a lad of sixteen, actually an apprentice to trade, is not far removed. In my opinion, the pursuer entirely fails to make anything of the alleged want of intelligence on the part of the deceased. I also utterly reject the notion that the area of water in question was in such a condition that it might fairly enough be mistaken for *terra firma*. The deceased and his companion clearly showed that they knew better by resorting to it for the amusement of which they were in quest. But I feel myself unable to take a serious view of what was done by this young lad, and shared in by his companion. The water was literally at the door of his employment; he was no trespasser in going upon it, he had no warning of any kind; there is nothing in the evidence to suggest that he knew of the danger he ran, or had any reason to suspect it, and altogether it seems to me that his act was, even to a lad of sixteen, so natural as to relieve him from the imputation of serious recklessness."

On appeal the Sheriff (GUTHRIE SMITH) on 11th October 1887 recalled this interlocutor, and found that it was not proved that the death of the deceased was due to the fault of the defenders, and therefore assoilzied them from the conclusions of the action.

"*Note.*—The pursuer attributes the death of his son to the fault of the defenders, because he says in filling up the old channel of the Dee they allowed a certain area of water deep enough to drown people to remain unfenced and unprotected. In a former case in this Court it was held (I still think on good grounds) that the defenders, as owners of the reclaimed ground, were under a certain duty to the public while the operations were in progress. The public were not excluded from the ground—in fact could not be effectually excluded—and as it was well known to be the resort of young children, measures ought to have been taken by the Harbour Commissioners to prevent them, at the risk of their own safety, from getting on the water on loose planks and the like. In that case the boy who was drowned was seven years of age, and there was no room for the plea of contributory negligence, seeing that he had but given way to his natural instincts, the very risk of which raised the duty incumbent on the defenders which they had failed to fulfil. But this is quite a different case. The deceased was a lad of sixteen, able to take care of himself. He was no stranger to the place, for he had been working for three weeks as an apprentice joiner at a building which was in course of erection on the reclaimed ground. As far as he was concerned no fence was needed, for there was no risk of his falling in, nor was a watchman to warn him against going on the water, for going and coming about the place daily he probably knew as well as the watchman himself what the risk of such a proceeding was. . . . But unfortunately having been left to watch the tools during the breakfast hour, when the men were away, he thought he would have a sail on a raft, upset himself in the water, and was drowned before he could be rescued. I think in these circumstances the defenders are in no way answerable for the death of the deceased, as but for his own fault the misfortune would not have happened."

The pursuer appealed, and argued—The piece of water was a perfectly obvious source of danger, and just the sort of place to which boys would be likely to resort for amusement. It should have been fenced off from the public. The defenders had been guilty of negligence of the highest kind, and there could be no contributory negligence on the part of the deceased in the circumstances—*Sharp* v. *Pathhead Spinning Company (Limited)*, January 30, 1885, 12 R. 574; *Findlay* v. *Angus*, January 14, 1887, 14 R. 312; *Galloway* v. *King*, June 11, 1872, 10 Macph. 788; *M'Gregor* v. *Ross and Marshall*, March 2, 1883, 10 R. 725.

Counsel for the defenders was not called on.

At advising—

LORD JUSTICE-CLERK—This is a sad case, but I am entirely of the same opinion as the Sheriff. I think that no case at all of fault on the part of the Aberdeen Harbour Commissioners has been made out so far as this accident is concerned.

I have no doubt that the judgment was right in the case in the Sheriff Court, in which they were made responsible for the death of a boy of seven years of age who was incapable of taking care of himself. I think that there did exist a danger for boys of that age which they were bound to provide against. But for a boy of sixteen years of age I think there was no such danger, and no obligation on the Commissioners to provide against his voluntary actings. I have always thought that the term "contributory negligence" has been much misapplied. The obligation of the employer or proprietor or master, as the case may be, is in no way lessened by the actings of the person who suffers by the former's negligence. Once you admit the obligation of the employer, that obligation continues as much where there is contributory negligence as before. It is not a matter of contract, but only this, that a man while he is entitled to be protected against ordinary risks is not entitled to increase those risks and to be protected against them if he suffers in any way. I see no ground, then, here for the application of the doctrine of contributory negligence. The boy saw the danger and was quite aware of it, equally as well as his fellows who used to float rafts on the sheet of water. Probably no fence would have kept

them out. The boy's death was the result of a piece of foolhardiness with which the Commissioners had nothing to do. I think, then, we must affirm the Sheriff's judgment.

LORD CRAIGHILL—I am of the same opinion. The accident took place in broad daylight, and I do not think that there was any obligation, as suggested, on the Commissioners to keep a watchman to warn boys of sixteen off the sheet of water. The poor lad was quite able to take care of himself, and he took the risk.

LORD RUTHERFURD CLARK concurred.

The Court pronounced this interlocutor:—

"Find that the pursuer has not proved that his son's death is attributable to fault or negligence on the part of the defenders: Therefore dismiss the appeal, and affirm the judgment of the Sheriff appealed against: Of new assoilzie the defenders from the conclusions of the action."

Counsel for the Appellant—Ure. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Respondents—Asher, Q.C.—Dickson. Agents—Morton, Neilson, & Smart, W.S.

Tuesday, January 24.

FIRST DIVISION.

[Sheriff of Aberdeen.

CAIRD *v.* PAUL.

Bankruptcy—Appeal from Sheriff in Cessio—Debtors (Scotland) Act 1880 (43 *and* 44 *Vict. cap.* 34)—*Act of Sederunt, Dec.* 22, 1882, *secs.* 6 *and* 11.

An appeal to the Court of Session is competent in a process of *cessio* under the Debtors Act 1880 against an interlocutor of the Sheriff reviewing a deliverance of the trustee.

Bankruptcy — Baluncing of Accounts—Landlord and Tenant.

The trustee in a process of *cessio*, in which the bankrupt was tenant of a farm under an unexpired lease, did not adopt the lease, and only intromitted for the purpose of winding-up. For this purpose he entered into two agreements with the landlord, by the first of which it was agreed that he should remove at the ensuing term, and have all the privileges of an outgoing tenant; and by the second a reference was made to arbiters to ascertain the value of certain articles which under the lease were to be taken over and paid for by the landlord. The landlord claimed right to set off the amount of this valuation against arrears of rent due by the bankrupt. *Held* that as the debt due by the landlord was payable under the agreements between him and the trustee, there was no concourse between it and a debt due by the bankrupt.

William Taylor, tenant of the farm of Blackbutts, Muchalls, Kincardineshire, executed a disposition *omnium bonorum*, under the Debtors (Scotland) Act 1880, in favour of George Scott Caird, solicitor, Stonehaven. At the date of the *cessio* there were still several years of his lease to run.

Caird, as trustee, entered into two agreements with William Paul, advocate in Aberdeen, as factor and commissioner for the landlords, Dr Milne's trustees. The first of these agreements provided—"And whereas the said first party, as trustee foresaid, has intimated that he is not to continue the possession and occupation of said farm of Blackbutts, or to adopt said lease, and it is consequently expedient that an arrangement should be made for the laying down of the grain crops for the present year;" therefore, under certain reservations as to the landlord's right of hypothec, and subject to certain estate regulations, it was agreed—"*First*, that the said first party hereto shall, as trustee foresaid, continue in the occupation of said farm of Blackbutts until the term of Whitsunday next, when he shall remove therefrom as outgoing tenant in manner provided in the said general regulations and conditions, and shall have all the privileges of an outgoing tenant as if the lease had then come to its natural termination; *second*, That in the preparation of the ground for the crops of 1887, the first party hereto shall observe the regulations above mentioned, and perform the necessary work in an efficient manner, and lay down the crops at the sight and to the satisfaction of the ground officer on the estate; and *third*, That the said first party shall grant at his expense, if required by the said second party, a formal and valid renunciation of said lease in favour of the said proprietors as at and from the term of Whitsunday 1887."

The second agreement provided that the value of certain enumerated articles on the farm, which under the lease were to be taken over and paid for by the landlord, should be ascertained by arbiters. The valuation of these articles amounted to £108, 7s. 6d.

Paul then lodged a claim, as factor for the landlords, for arrears of rent amounting to £328, 14s. 2d., from which he claimed right to deduct the sum of £108, 7s. 6d., the amount of the valuation.

The deliverance of the trustee upon this claim was that the factor was not entitled to take credit or plead compensation in respect of his claim against the bankrupt for this sum of £108, 7s. 6d., but that they were entitled to a dividend on the sum of £328, 14s. 2d.

Paul also lodged, as factor, a preferable claim for the rents due at Martinmas 1886, and Whitsunday 1887, with the expenses incurred in connection with sequestration for the rents, amounting to £104, 19s. 7d.

The deliverance of the trustee upon this claim was that Paul was entitled to retain the amount of this claim of £104, 19s. 7d. from the sum of £108, 7s. 6d. above mentioned, due by him to the trustee, and he therefore rejected the claim *in toto*.

On appeal, the Sheriff-Substitute (BROWN), on 26th November 1887, pronounced this interlocutor—"Finds (1) that the claimant William Paul is entitled to be ranked preferably on the bankrupt's estate for the sum of £104, 19s. 7d., in terms of his claim; (2) that the said William Paul is entitled to compensate the amount of the